1989

Reed Maxfield v. Owen A. Rushton and Carol Rushton v. State of Utah, Department of Social Services : Brief in Opposition to Certiorari

Utah Supreme Court

Lorin N. Pace; attorney for plaintiff.
Henry S. Nygaard; Nygaard, Coke, and Vincent; attorney for resondents.

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

REED MAXFIELD, Plaintiff/Appellant, vs. OWEN A. RUSHTON and CAROL RUSHTON, his wife, Defendants/Respondents.	:	COURT OF APPEALS Case No. 880332.CA 890403
OWEN A. RUSHTON and CAROL RUSHTON, his wife, Third-Party Plaintiffs/ Respondents, vs. STATE OF UTAH, by and through UTAH STATE DEPARTMENT OF SOCIAL SERVICES, Third-Party Defendants/ Co-Respondents.	:	

RESPONDENTS RUSHTONS' BRIEF IN OPPOSITION TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI FROM DECISION OF UTAH COURT OF APPEALS DATED AUGUST 23, 1989

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STATEMENT OF THE CASE

Nature of the Case

The Petitioner Maxfield has filed for a Writ of Certiorari from the Decision of the Court of Appeals sustaining the judgment of the trial court. The decision of the Court of Appeals was rendered August 23, 1989. The sole issue presented to the Supreme Court is whether the Petitioner's brief raises the appropriate considerations governing review of certiorari by the Utah State Supreme Court. The governing law in determining this question are the provisions of Rule 43 of the Rules of the Utah Supreme Court. Rule 43 provides:

> (1) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;
>
> (2) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of this court;
>
> (3) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision; or
>
> (4) When the Court of Appeals has decided an important question of municipal, state or federal law which has not been, but should be, settled by this court.

Statement of Facts

This action arises out of a dispute between Reed

Maxfield and Owen A. Rushton and Carol Rushton, his wife, with respect to the title and right of possession of two parcels of real estate located in Salt Lake County, Utah.

Maxfield filed his original Complaint on October 20, 1980, simply alleging that he was the fee title owner of the property and entitled to possession. Rushtons filed a Third-party Complaint joining the State of Utah as a third-party defendant to the action.

On or about December 10, 1984, Maxfield filed a motion to file a second amended complaint including causes of action for fraud and punitive damages despite the fact that the trial date had been set for January 10, 1985, only one month from the date of filing of said motion. Shortly thereafter, in December 1984, Maxfield filed a petition in bankruptcy under a Chapter 11 proceeding. Subsequently, the judge in the Bankruptcy Court permitted the lawsuit to be heard in the Third Judicial District Court.

On June 1, 1987, the trial judge, after hearing oral argument from the parties, set a scheduling order which included the first place trial setting of September 15, 1987. On August 10, 1987, counsel for Maxfield filed a motion to continue the trial date. The motion was denied on August 17, 1987. On August 11, 1987, Maxfield filed a motion to dismiss all claims by any of the parties against the plaintiff.

On August 19, 1987, the plaintiff Maxfield then filed a

third amended complaint raising entirely new issues including a civil rights cause of action. At the pretrial hearing on August 31, 1987, with all parties present, counsel for Maxfield moved that he be allowed to withdraw. At that time, the court heard arguments from all the parties including the plaintiff Maxfield himself. The court, after hearing all the arguments from the parties, dismissed the plaintiff's cause of action for failure to prosecute.

The Court of Appeals, in reviewing the file, was very much aware of the fact that the defendants had filed three requests for trial settings and had obtained four trial settings and that plaintiff Maxfield continually opposed all of the defendants' or court's efforts to have the matter proceed in a judicious manner for trial. The plaintiff appealed from the judgment dismissing his cause of action and raised the following issues in his brief:

> 1. The District Court erred in refusing to grant plaintiff's Motion for Summary Judgment. (Page 10 of Appellant's Brief.)
>
> 2. As a matter of law, the execution and sale of real property of record in plaintiff by State of Utah for satisfaction of third-party judgment was improper and plaintiff's Motion for Summary Judgment should have been granted. (Page 13 of Appellant's Brief.)
>
> 3. The court erred in failing to grant an order allowing redemption of the real property. (Page 14 of Appellant's Brief.)
>
> 4. The court erred in entering an order of dismissal of the plaintiff's Complaint for failure to prosecute. (Page 16 of Appellant's Brief.)

In the Petition filed by the Appellant for a Writ of Certiorari, the following specific questions are presented for review:

> 1. The District Court dismissed the plaintiff's case when the plaintiff was ready, willing and able to proceed.
>
> 2. The trial court erred in denying the plaintiff's Motion for Summary Judgment.

The opinion of the Utah Court of Appeals written by Judge Garff confirmed the action of the trial court. In particular, Judge Garff stated on page 3:

> The trial court dismissed Maxfield's cause of action pursuant to Rule 41(b) of the Utah Rules of Civil Procedure, for his "failure to timely prosecute the case."

Such a dismissal under Rule 41(b) operates as an adjudication upon the merits of the case. The court on page 4 of its opinion states:

> After a thorough review of the record, we find that Maxfield was dilatory in prosecuting the case. After he filed his complaint on October 20, 1980, he amended it twice and attempted to amend it yet a third time, each time adding additional theories of the case. He moved three times for summary judgment: the first time on March 11, 1981, prior to joinder of the State; the second time on May 30, 1984; and the third time on June 19, 1984, when he neglected to give adequate notice of the hearing to opposing counsel. He filed an interlocutory appeal in 1981, appealing the trial court's refusal to grant his first motion for summary judgment, which the supreme court declined to hear . . . Further, on three occasions trial dates were set, he objected to the trial settings on the grounds that he wished to amend his complaint, that he was involved in the bankruptcy proceeding, and that his new counsel had inadequate preparation time. During the course of the action, he retained three different

> attorneys, two of whom withdrew from the case because of his failure to pay them. He filed no certificates of readiness for trial and, despite his protests as to insufficient discovery time, no motions for the taking of depositions.

Judge Orme, in a concurring opinion, states on page 8:

> Sua sponte dismissal for failure to prosecute is usually not appropriate except when it follows a substantial period of complete inactivity. It would be an extraordinary case where such a dismissal would be appropriate with trial scheduled in just a few days, especially following a flurry of motion activity. While the question is a closer one for me than the main opinion may suggest, I am persuaded this is that extraordinary case.

It is evident that the Court of Appeals was familiar with all the issues that were raised on appeal and are now raised by this Writ of Certiorari--and specifically addressed them.

ARGUMENT

I

THE PETITIONER, BY WRIT OF CERTIORARI, HAS REPEATED THE SAME ISSUES RAISED ON APPEAL AND HAS NOT RAISED ANY ISSUES AS DEFINED BY RULE 43 OF THE RULES OF THE UTAH SUPREME COURT.

Unless otherwise provided for in the constitution or statutory form, certiorari is not a writ of right in most cases. Its issuance rests upon the sound discretion of the court to which the petition is made. Boggess v. Morris, 635 P.2d 39 (Utah 1981). The Petition will not be granted and the Writ will not be issued on the mere suggestion of the party that there is an error in the record. The pleading seeking relief by way of certiorari must specifically designate the jurisdictional excesses or abuse of

discretion claimed and are subject to being dismissed if they merely set forth a conclusion. Lee v. Provo City Civil Service Commission, 582 P.2d 485 (Utah 1978). The Utah Court in Rohwer v. District Court, 125 P. 671 (Utah 1912) has indicated that a special case must be shown for the court to exercise its discretion in issuing a common law writ of certiorari. Therefore, the writ of certiorari is to be used sparingly.

Rule 43 of the Rules of the Utah Supreme Court is very specific in setting forth the considerations which shall govern the court's review of certiorari. The Court of Appeals must have rendered a decision which is in direct conflict with the decision of another panel of the Court of Appeals. The panel of the Court of Appeals must have decided a question of state or federal law in such a manner that it is in conflict with the Utah Supreme Court. Third, a panel of the Court of Appeals rendered a decision which radically departs from the usual course of judicial proceeding. Fourth, the Court of Appeals decided an important question of municipal, state or federal law which has not been but should be settled by the Utah State Supreme Court.

In reviewing these considerations, it is obvious that the only possible consideration that could be raised as an appropriate consideration is number 3 which should require that the Court of Appeals issue a decision which is extreme and did constitute an abuse of discretion in arriving at its decision.

Clearly, the decision of the Court of Appeals demon-

strated that the Court of Appeals fully understood all of the facts in the case and thereafter applied the appropriate law as set forth in the decision of this court. In particular, the appropriate law was applied from the rulings in Brasher Motor and Finance Company v. Brown, 23 Utah 2d 247, 461 P.2d 464 (Utah (1969); Westinghouse Electric Supply Company v. Paul W. Larsen Contractor Inc., 544 P.2d 876 (Utah 1975); K.L.C. Incorporated v. McLean, 656 P.2d 986 (Utah 1982). In Maxfield v. Fishler, 538 P.2d 1323 (Utah 1975), the Utah Supreme Court found that the trial court justifiably dismissed the plaintiff's case because she had been dilatory in responding to the defendant's efforts of discovery, had resisted attempts made by the defendant to get the case to trial, was not ready to proceed at the time of the trial date because of inexcusable neglect, and had no justification for continuance as required by Utah Rules of Civil Procedure 41(b).

Not only did the Court of Appeals understand clearly the history of this case, it applied the law in a fair and even-handed manner. There certainly was no abuse of any discretion.

Petitioner, by filing for writ of certiorari, not only fails to raise any issue as required under the four considerations as set forth in Rule 43, said petitioner simply repeats the same issues raised on appeal. With respect to the first question raised for review, counsel for the petitioner in his brief states:

> The District Court dismissed the plaintiffs case when plaintiff was ready willing and able to proceed. The dismissal coming in a pre-trial con-

> ference a mere 15 days prior to trial date. Evidently the District court became irritated and frustrated with counsel for Plaintiff who indicated he wanted to withdraw at that point.

This argument is an unsupported emotional request for undeserved assistance from the Supreme Court. It also represents a serious misrepresentation of the actual facts as they are related in the decision of the Court of Appeals.

With respect to the second issue raised in the Petition for Writ for Certiorari, the Petitioner states:

> Early in the chronological history of this case the plaintiff moved the district court for summary judgment based on pleadings and affidavits . . . The Honorable Judge Sawaya denied the motion for summary judgment and an interlocuatory appeal was filed with the Supreme Court . . . Plaintiff believes that the ruling denying the Motion for Summary Judgment by Judge Sawaya was in error and should have been granted.
>
> * * *
>
> . . . The Utah Court of Appeals either did not consider the argument or if so, overlooked entirely the point in its opinion.

The foregoing statement is in direct conflict with the opinion of the Court of Appeals which on numerous occasions refers to Appellant's motions for summary judgment and the reasons for the denial thereof. Again, it is amply clear that the court was not only familiar with the requests and motions for summary judgment but declared that the failure to prosecute is a more overriding issue and that the case was justifiably dismissed.

The Petition has not raised any appropriate considera-

tion upon which the Supreme Court of Utah can grant the Writ of Certiorari.

II

THE UTAH COURT OF APPEALS DID NOT ABUSE ITS DISCRETION WHEN RENDERING ITS DECISION.

The primary issue presented to the Court of Appeals on appeal was whether or not the trial court erred in dismissing the plaintiff's Complaint under Rule 41(b) of the Utah Rules of Civil Procedure. With respect to the standard to be followed by the courts in determining whether or not a complaint should be dismissed under Rule 41(b), the case of K.L.C Incorporated v. Ron McLean, 656 P.2d 986 (Utah 1982) reiterates the five basic factors to be considered by the court in similar cases:

1. The conduct of both parties;

2. The opportunity each had to move the case forward;

3. What each of the parties has done to move the case forward;

4. What difficulty or prejudice may have been caused to the other side;

5. And most important, whether injustice may result from the dismissal.

The Court of Appeals' opinion addresses this very standard. Judge Garff on page 4 of the Decision states:

> A court's discretion, however, must be balanced against higher priority; to "afford disputants an opportunity to be heard and to do justice between them." Westinghouse Electric Supply Company, 544 P.2d at 879. Thus, there is more to consider in determining if a dismissal for failure to prosecute is proper than merely the amount of time elapsed since the suit was filed. Id. The factors which we consider may include the following: (1) The conduct of both parties; (2) the opportunity each party has had to move the case forward;

(3) what each of the parties has done to move the case forward; (4) what difficulty or prejudice may have been caused to the other side; and (5) most important, whether injustice may result from the dismissal.

After a thorough review of the record, we find that Maxfield was dilatory in prosecuting the case.

The decision of the Court of Appeals was one based on sound reasoning, fairness, justice, and after due consideration.

CONCLUSION

The Respondents Rushton respectfully submit that the Petition has not presented any issue that can or should legally support the granting of a Writ of Certiorari. The Petition itself is an emotional repetition of the same arguments that have been made for more than nine years. As Judge Orme stated in his concurring opinion:

> The system had been burdened long enough. Dismissal for failure to timely prosecute was an appropriate exercise of judicial discretion.

RESPECTFULLY SUBMITTED this 31 day of October, 1989.

NYGAARD, COKE & VINCENT

By _____
Henry S. Nygaard
Attorney for Respondents,
Owen and Carol Rushton

CERTIFICATE OF SERVICE

I hereby certify that on the 31 day of October, 1989, I caused to be mailed, first class postage prepaid, four true and correct copies of the Respondents Rushtons' Brief in Opposition to Appellant's Petition for Writ of Certiorari from Decision of Utah Court of Appeals Dated August 23, 1989, to the following counsel:

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Attorney for Defendants/
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APPENDIX

COVER SHEET

SE TITLE:
ed Maxfield,
Plaintiff and Appellant,

880332-CA

en A. Rushton, et al.,
Defendants and Respondent.

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IAL COURT:
N. David S. Young
ird District Court
lt Lake County
0-8167

gust 23, 1989 - Opinion by Judge Regnal W. Garff
Concurred: Judge Pamela T. Greenwood
Concurring Specially: Judge Gregory K. Orme

is cause having been heretofore argued and submitted, and the Court
ing sufficiently advised in the premises, it is now ordered,
judged and decreed that the judgment of the trial court herein be,
d the same is, affirmed.

RTIFICATE OF MAILING

hereby certify that on the 24th day of August, 1989, a true and
rrect copy of the attached opinion was mailed to each of the above
rties and to the trial court.

lia Whitfield
puty Clerk

FILED

AUG 23 1989

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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Reed Maxfield, Plaintiff and Appellant,	OPINION (For Publication)
2378.1 v.	
Owen A. Rushton and Carol Rushton, his wife, Defendants and Respondents.	Case No. 880332-CA
Owen A. Rushton and Carol Rushton, his wife, Third-Party Plaintiffs and Respondents, v.	
State of Utah, by and through Utah State Department of Social Services, Third-Party Defendants and Co-Respondents.	

Third Judicial District Court, Salt Lake City
The Honorable David S. Young

Attorneys: Lorin N. Pace, Salt Lake City, for Appellants.
Henry S. Nygaard, Salt Lake City, for Respondents;
David L. Wilkinson, Stephen G. Schwendiman, Bernard M. Tanner, Leonard E. McGee, Salt Lake City, for Third-Party Defendants.

Before Judges Garff, Greenwood, and Orme.

GARFF, Judge:

Plaintiff and appellant, Reed Maxfield, appeals the trial court's dismissal of his action against defendants and respondents, Owen A. and Carol Rushton, and the State of Utah, for failure to prosecute. We affirm the trial court's dismissal of his action.

We recite only those facts pertinent to disposition of this appeal.

Maxfield initially filed his complaint in this action on October 20, 1980, alleging that the Rushtons had wrongfully deprived him of his property by purchasing it through an illegal sheriff's sale. The Rushtons filed their answer and counterclaim on April 1, 1981, along with a third-party complaint against the State of Utah, requesting reimbursement of the purchase price for the property if the court should find in Maxfield's favor. On April 14, 1981, the State answered the Rushtons' third-party complaint and filed a third-party complaint against Maxfield.

From October 20, 1980 until December 14, 1984, various motions were filed by the parties, primarily by Maxfield, resulting in obfuscation of the issues and protracted delay. Two additional factors contributed to the delay: an eighteen month interruption while the Rushtons were on a mission for their church, and a bankruptcy filing by Maxfield.

The case remained in limbo for nearly two years as a result of Maxfield's bankruptcy. Finally, on November 18, 1986, the Rushtons filed a certificate of readiness for trial. Ten days later, Maxfield objected to setting the case for trial because he wished to amend his complaint by adding further claims against the State, his discovery was incomplete, his bankruptcy stay was presently effective, and his new attorney needed time to familiarize himself with the case. Despite Maxfield's objections, on February 20, 1987, the bankruptcy court ordered that the case could be heard in district court. Thereupon, the State filed for an immediate trial setting.

On March 4, 1987, Maxfield's counsel withdrew because Maxfield had failed to pay him. On March 20, 1987, the Rushtons gave Maxfield notice to obtain substitute counsel and, again, moved for an immediate trial setting. A hearing was scheduled on this motion for June 1, 1987. On May 18, 1987, Maxfield filed a pro se objection to the trial setting on the grounds that he was incapable of handling the case himself and that he was in the process of seeking new counsel.

At the June 1 hearing, the court set trial for September 15, 1987, and scheduled a pretrial hearing on August 31, 1987. All discovery was to be completed prior to August 17, 1987.

On August 10, 1987, the State certified to the court that it had complied with Maxfield's discovery requests, answered Maxfield's proposed second amended complaint, and moved for

summary judgment against Maxfield. Maxfield filed a motion to dismiss all claims by other parties against him because of his discharge in bankruptcy and filed an objection to the trial setting, requesting a two month continuance on the grounds that his new counsel had scheduling problems and that he intended to file a third amended complaint. The court scheduled a hearing on the State's motion for summary judgment for August 24, 1987.

Between August 11 and 17, 1987, the parties filed more miscellaneous motions. On August 17, 1987, the court denied Maxfield's motion to continue the trial date or to extend discovery time. Thereafter, Maxfield filed a response to the State's motion for summary judgment, alleging insufficient discovery time, and filed his third amended complaint, which set forth a new conspiracy theory between the Rushtons and the State.

On August 20, 1987, the State submitted a list of expected witnesses and a certificate of compliance with Maxfield's discovery requests. The following day, it objected to Maxfield's third amended complaint. The Rushtons filed a similar objection. The trial court heard all the parties' motions on August 24, 1987, denying Maxfield's motion to file a third amended complaint and also the State's motion for summary judgment.

At the pretrial hearing on August 31, 1987, the trial court again denied the parties' prior motions. Maxfield's new attorney moved to withdraw as counsel. The court denied counsel's motion to withdraw, and ordered that Maxfield's action be dismissed for failure to timely prosecute. Maxfield subsequently appealed this order.

On appeal, Maxfield argues that the trial court erred in: (1) dismissing his action for failure to prosecute; (2) refusing to grant summary judgment in his favor; and (3) refusing either to void the sheriff's sale, thereby quieting title in his favor, or to grant him the immediate right to redeem the properties.

The trial court dismissed Maxfield's cause of action, pursuant to Rule 41(b) of the Utah Rules of Civil Procedure, for his "failure to timely prosecute the case."[1] Such a

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1. Utah R. Civ. P. 41(b), in part, states that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

dismissal, under Rule 41(b), "operates as an adjudication upon the merits" of the case.

It is well established that the trial court may, on its own motion, dismiss an action for want of prosecution under Rule 41(b). Brasher Motor & Fin. Co. v. Brown, 23 Utah 2d 247, 461 P.2d 464, 464-65 (1969); Charlie Brown Constr. Co. v. Leisure Sports Inc., 740 P.2d 1368, 1370 (Utah Ct. App. 1987). This authority is an "'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Charlie Brown Constr. Co., 740 P.2d at 1370 (quoting Link v. Wabash R. Co., 370 U.S. 626, 630-31 (1962)). Therefore, the trial court has "a reasonable latitude of discretion in dismissing for failure to prosecute if a party fails to move forward according to the rules and the directions of the court, without justifiable excuse." Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor Inc., 544 P.2d 876, 878-79 (Utah 1975) (footnote omitted). Consequently, a lower court's dismissal of a case under Rule 41(b) will not be disturbed on appeal unless it is clear from the record that it has abused its discretion. Wilson v. Lambert, 613 P.2d 765, 767 (Utah 1980); Department of Social Servs. v. Romero, 609 P.2d 1323, 1324 (Utah 1980); Reliance Nat. Life Ins. Co. v. Caine, 555 P.2d 276, 277 (Utah 1976); Thompson Ditch Co. v. Jackson, 29 Utah 2d 259, 508 P.2d 528, 529 (1973).

A court's discretion, however, must be balanced against a higher priority: to "afford disputants an opportunity to be heard and to do justice between them." Westinghouse Elec. Supply Co., 544 P.2d at 879. Thus, there is more to consider in determining if a dismissal for failure to prosecute is proper than merely the amount of time elapsed since the suit was filed. Id. The factors which we consider may include the following: (1) The conduct of both parties; (2) the opportunity each party has had to move the case forward; (3) what each of the parties has done to move the case forward; (4) what difficulty or prejudice may have been caused to the other side; and (5) most important, whether injustice may result from the dismissal. K.L.C. Inc. v. McLean, 656 P.2d 986, 988 (Utah 1982); Utah Oil Co. v. Harris, 565 P.2d 1135, 1137 (Utah 1977).

After a thorough review of the record, we find that Maxfield was dilatory in prosecuting the case. After he filed his complaint on October 20, 1980, he amended it twice and

attempted to amend it yet a third time, each time adding additional theories of the case. He moved three times for summary judgment: the first time on March 11, 1981, prior to joinder of the State; the second time on May 30, 1984; and the third time on June 19, 1984, when he neglected to give adequate notice of the hearing to opposing counsel. He filed an interlocutory appeal in 1981, appealing the trial court's refusal to grant his first motion for summary judgment, which the supreme court declined to hear. He then filed a number of miscellaneous, primarily self-serving motions over the course of the proceedings, none of which served to move the case forward, but were, instead, apparent attempts to circumvent the denial of his motions for summary judgment. He further delayed prosecution of the case for nearly two years by filing for bankruptcy on December 10, 1984, shortly before the case was to come to trial. During this bankruptcy action, he assigned his interest in the disputed property, which was his major asset, to a corporation which he allegedly owned and controlled as the primary shareholder. Further, on the three occasions trial dates were set, he objected to the trial settings on the grounds that he wished to amend his complaint, that he was involved in the bankruptcy proceeding, and that his new counsel had inadequate preparation time. During the course of the action, he retained three different attorneys, two of whom withdrew from the case because of his failure to pay them. He filed no certificates of readiness for trial and, despite his protests as to insufficient discovery time, no motions for the taking of depositions.

Although the Rushtons did not answer Maxfield's complaint for approximately six and one-half months after it was initially filed, the rest of their conduct and that of the State generally served to move the case along. Together, the Rushtons and the State filed four motions indicating their readiness for trial, one of which was filed almost immediately after the Rushtons returned from their mission. The record indicates that they actively pursued discovery, including the taking of depositions, and certified twice that they had complied with Maxfield's discovery requests. In contrast, they had to file motions twice to compel Maxfield to comply with their discovery requests.

In evaluating the relevant factors, we find, first, that Maxfield's conduct in prosecuting the case was dilatory while defendants' overall conduct served to move the case along.

Second, although both parties were unable at times to move the case forward, Maxfield's behavior was more dilatory. Maxfield was unable to prosecute the case while the Rushtons served their eighteen month mission. However, once the Rushtons returned, they almost immediately notified the court that they were ready to proceed to trial. Similarly, defendants were unable to prosecute the case during the pendency of Maxfield's twenty-two month bankruptcy action. Unlike the Rushtons, however, Maxfield did not voluntarily inform the court that his bankruptcy action was completed and the case could move forward in district court, but, instead, objected to trial settings and waited for the State to petition the bankruptcy court for permission to proceed with the action.

Third, despite his prodigious number of motions, little or nothing that Maxfield did after filing his initial complaint served to move the case along, while virtually everything that defendants did after the Rushtons returned home from their mission did.

Fourth, defendants argue that, if we overrule the trial court and remand this case for hearing on the merits, they will be substantially prejudiced because many of their witnesses have either forgotten the events surrounding the controversy or have become unavailable in the nine years this case has been pending. To rebut Maxfield's assertion that he will be prejudiced by loss of his property interest without having had his day in court, defendants point out that Maxfield's property interest is already assigned to a corporation in which he claims to have no interest. We do not find these assertions to be unreasonable.

Fifth, while we recognize that injustice could result from dismissal of this case, in that Maxfield will lose whatever interest he may have in the disputed property without having the opportunity to argue his case on its merits, we conclude that he had more than ample opportunity to prove his asserted interest and simply failed to do so. Such nonaction is inexcusable, not only from the standpoint of the parties, but also because it constitutes abuse of the judicial process.

In Maxfield v. Fishler, 538 P.2d 1323, 1324-25 (Utah 1975), the Utah Supreme Court found that the trial court justifiably dismissed the plaintiff's case because she had been dilatory in responding to the defendant's efforts at discovery, had resisted attempts made by the defendant to get the case to trial, was not ready to proceed at the time of the trial date

because of inexcusable neglect, and had no justification for continuance as required by Utah R. Civ. P. 40(b).[2] We find that the present case is factually comparable to Maxfield v. Fishler and other cases which have been dismissed for failure to prosecute. See e.g., Thompson Ditch Co., 508 P.2d at 528. We, therefore, affirm the trial court's judgment in dismissing Maxfield's action.

Because this issue is dispositive of the case, we decline to address Maxfield's remaining issues. Costs on appeal to defendants.

Regnal W. Garff, Judge

I CONCUR:

Pamela T. Greenwood, Judge

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2. Utah R. Civ. P. 40(b) provides that,

> [u]pon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

ORME, Judge (concurring specially):

Sua sponte dismissal for failure to prosecute is usually not appropriate except when it follows a substantial period of complete inactivity. It would be an extraordinary case where such a dismissal would be appropriate with trial scheduled in just a few days, especially following a flurry of motion activity. While the question is a closer one for me than the main opinion may suggest, I am persuaded this is that extraordinary case.

In my view, what saves the dismissal in this case from crossing into the realm of abused discretion is this: Maxfield's latest counsel's motion for leave to withdraw coupled with his motion for leave to file yet another amended complaint constituted, taken together, a concession by Maxfield that he was nowhere near being ready to try his case in a matter of a few days even though the action had been pending for the better part of a decade. It is the length of time this action had been pending coupled with Maxfield's obvious unreadiness that make sua sponte dismissal appropriate in this case. I reiterate, however, that in the ordinary case where a trial date is set, potentially dispositive motions have been denied at a recent pretrial, and all parties are represented by counsel, however reluctant such representation might be, the appropriate course for the court is simply to try the case, even though earlier periods of inaction may exist.

I also wish to comment on two aspects of the main opinion's analysis of the parties' comparative culpability in connection with the delays which plagued this case. First, the opinion says that "Maxfield was unable to prosecute the case while the Rushtons served their eighteen month mission" and seems to imply that the Rushtons were likewise relieved of their duty to move the case along during that period. However, voluntary absence from the jurisdiction does not insulate a party from litigation nor is it a legitimate justification for avoiding one's own litigation obligations. This is so even where the reasons for the absence are well-intentioned, such as with the Rushtons' religious mission in this case.

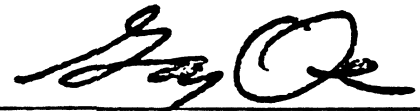
Second, the main opinion seems to blame Maxfield for a delay of nearly two years following his bankruptcy filing and to suggest that Rushtons were excused from pursuing their counterclaims during that time. But from all that appears, Maxfield's bankruptcy petition was legitimate under federal law and I do not see how we can fault him for taking advantage of

his rights under this federal scheme. That being the case, 11 U.S.C. § 362 stayed the Rushtons and the state from pursuing their claims against him. Of course, this "automatic stay" protects the debtor from the prosecution of actions against him, but does not, of itself, excuse him from proceeding with his actions pending against others. Nonetheless, the debtor's claims pending against others become the property of the bankruptcy estate and where the bankruptcy is one where a trustee is appointed, the trustee succeeds the debtor as real party in interest relative to those claims. The trustee enjoys the authority to administer the claims, i.e., pursue them, settle them, or abandon them as the trustee may deem appropriate. Thus, Maxfield may not be responsible for the inactivity in the instant action which followed his bankruptcy filing. Even if he is, the delay may be entirely legitimate depending on the objectives and status of the bankruptcy cases and the ongoing progress of liquidation or reorganization.

Conversely, one who has an action pending against a party who files a bankruptcy petition--as with the Rushtons and their counterclaim against Maxfield--is not altogether helpless in the face of the bankruptcy filing. With leave of the bankruptcy court, as ultimately was obtained here, the claim can be pursued in state court at least to the point of liquidating the claim or, with consent of the non-bankruptcy party, can be adjudicated by the bankruptcy court. Depending on the particular case, waiting two years to request relief from the stay may or may not be consistent with appropriate diligence on the part of Rushton and the state.

In short, lengthy delays in state court litigation, for which "bankruptcy" is offered up as the major excuse, should be carefully scrutinized. Bankruptcy is simply not the hinderance to the timely resolution of disputes pending in state court which many would have state court judges believe.

The parties to the main action in this case sparred and postured for some seven years, showing little inclination to get their claims resolved on the merits. The system had been burdened long enough. Dismissal for failure to timely prosecute was an appropriate exercise of judicial discretion.



Gregory K. Orme, Judge

discretion of trial court. Sharp v. Canakis Gianulakis, 63 Utah 249, 225 P. 337 (1924).

Trial courts have substantial discretion in deciding whether to grant continuances. Christenson v. Jewkes, 761 P.2d 1375 (Utah 1988).

—Inability of counsel to attend trial.

The inability of counsel to be present at the time set for trial does not necessarily entitle his client to a continuance. Griffiths v. Hammon, 560 P.2d 1375 (Utah 1977).

——Unavoidable absence.

When counsel has made timely objections, given necessary notice, and has made a reasonable effort to have the trial date changed for good cause, it would be an abuse of discretion not to grant a continuance. Griffiths v. Hammon, 560 P.2d 1375 (Utah 1977).

—New theory of case.

Continuance could be obtained to develop a theory of the case suggested after issue joined and before trial. Tiernan v. Trewick, 2 Utah 393 (1877).

—Procedural delays.

Court properly denied motion for continuance in action based on credit card obligation which had been procedurally delayed for two and a half years by interrogatories and by various motions of the defendant; and although trial date had been set for four months, motion for continuance was not filed until nine days before trial. First Sec. Bank v. Johnson, 540 P.2d 521 (Utah 1975).

—Supporting affidavits.

Subdivision (b) does not require affidavits to accompany a motion for continuance. Bairas v. Johnson, 13 Utah 2d 269, 373 P.2d 375 (1962).

—Unavailable witness.

——Lack of diligence.

Where subpoena for absent witness was not placed in hands of an officer for service until the morning the case was called for trial, though it had been set for several weeks, and the witness had testified at a former trial, continuance was denied. Corporation of Members of Church of Jesus Christ of Latter-Day Saints v. Watson, 30 Utah 126, 83 P. 731 (1906).

In malpractice action, motion for continuance based on plaintiff's inability to serve subpoena on vacationing medical witness was properly denied, where plaintiff had made no effort to depose witness and had never contacted witness for the purpose of testifying. Maxfield v. Fishler, 538 P.2d 1323 (Utah 1975).

——Need.

Where the defendant's counsel had three weeks to prepare for trial, and where two of the witnesses, purportedly important to his case, were actually present at trial and thus subject to cross-examination, the purely speculative need for a third witness did not entitle the defendant to the granting of a motion for continuance. State v. Humpherys, 707 P.2d 109 (Utah 1985).

Cited in Thorley v. Thorley, 579 P.2d 927 (Utah 1978).

COLLATERAL REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d Continuance §§ 1 to 26, 43 to 53; 75 Am. Jur. 2d Trial §§ 25, 26.

C.J.S. — 17 C.J.S. Continuances § 1 et seq.; 88 C.J.S. Trial §§ 18 to 35.

A.L.R. — Admissions to prevent continuance sought to secure testimony of absent witness in civil case, 15 A.L.R.3d 1272.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 A.L.R.4th 1144.

Key Numbers. — Continuance ⇐ 1 et seq.; Trial ⇐ 1 to 7.

Rule 41. Dismissal of actions.

(a) **Voluntary dismissal; effect thereof.**

(1) **By plaintiff; by stipulation.** Subject to the provisions of Rule 23(c), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any

court of the United States or of any state an action based on or including the same claim.

(2) **By order of court.** Except as provided in Paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) **Involuntary dismissal; effect thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) **Dismissal of counterclaim, cross-claim, or third-party claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) **Costs of previously-dismissed action.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) **Bond or undertaking to be delivered to adverse party.** Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.

Compiler's Notes. — This rule is substantially similar to Rule 41, F.R.C.P.

TITLE VI. JURISDICTION ON WRIT OF CERTIORARI TO COURT OF APPEALS.

Rule 42. Review of judgments, orders, and decrees of Court of Appeals.

Unless otherwise provided by law, the review of a judgment, an order, and a decree (herein referred to as "decisions") of the Court of Appeals shall be initiated by a petition for a writ of certiorari to the Supreme Court of Utah. (Added, effective April 20, 1987.)

Rule 43. Considerations governing review of certiorari.

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor wholly measuring the court's discretion, indicate the character of reasons that will be considered:

(1) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(2) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of this court;

(3) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision; or

(4) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by this court.

(Added, effective April 20, 1987.)

Rule 44. Certification and transmission of record; filing; parties.

(a) **Appearance, docketing fee, filing, and service.** Counsel for the petitioner shall, within the time provided by Rule 45, pay the certiorari docketing fee and file, with proof of service as provided by Rule 21, ten copies of a petition which shall comply in all respects with Rule 46. The case then will be placed on the certiorari docket of the court. Counsel for the petitioner shall serve four copies of the petition on counsel for each party separately represented. It shall be the duty of counsel for the petitioner to notify all parties in the case of the date of filing and of the certiorari docket number of the case. Service and notice shall be given as required by Rule 21.

(b) **Joint and separate petitions.** Parties interested jointly, severally, or otherwise in a decision may join in a petition for a writ of certiorari; any one or more of them may petition separately; or any two or more of them may join in a petition. When two or more cases are sought to be reviewed on certiorari and involve identical or closely related questions, it will suffice to file a single petition for a writ of certiorari covering all the cases.

FILE NO. C80-8167

TLE: (✓ PARTIES PRESENT)	COUNSEL: (✓ COUNSEL PRESENT)
Reed Mayfield ✓	J. Brown ✓ C. Brown ✓
VS.	
Owen A. Rushton, Etal	N. Nygaard ✓ S. Schwendeman
	B. Thanes ✓ L. McGee ✓

Cindy Porter CLERK

REPORTER

BAILIFF

HON. David S. Young

DATE: August 31, 1987

THE ABOVE ENTITLED CASE COMES NOW ON REGULARLY BEFORE THE COURT FOR PRE-TRIAL CONFERENCE. COUNSEL APPEARING AS NOTED ABOVE.

WHEREUPON THE FOLLOWING ISSUES ARE DISCUSSED BETWEEN RESPECTIVE COUNSEI ND THE COURT. THE COURT NOW ORDERS THE ABOVE ENTITLED CASE BE SET FOR THE FOLLOWING (SEE BELOW) OR SETTLED.

	DATE	TIME
(1) DISCOVERY CUT-OFF DATE		
(2) MOTIONS		
(3) DATE FOR PRE-TRIAL CONFERENCE		
(4) LENGTH OF TRIAL JURY OR NON-JURY		
(5) TRIAL DATE Stricken	9/15/87	
(6) SETTLEMENT		

Based upon pltf's motion to withdraw from the case and upon pltf's failure to prosecute the case, the Court finds the case is hereby dismissed. Ms. Nygaard to prepare order of dismissal.

APPENDIX D.

HENRY S. NYGAARD, ESQ. (Bar No. 2435)
BEASLIN, NYGAARD, COKE & VINCENT
Attorneys for Owen A. Rushton and Carol Rushton
333 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 328-2506

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

REED MAXFIELD AND UTAH'S GREAT GAME PRESERVE,

Plaintiffs,

vs.

OWEN A. RUSHTON, CAROL RUSHTON, et al,

Defendants.

J U D G M E N T

OWEN A. RUSHTON and CAROL RUSHTON,

Third Party Plaintiffs,

vs.

STATE OF UTAH, by and through Utah State Department of Social Services,

Third Party Defendant and Third Party Plaintiff,

vs.

REED MAXFIELD,

Third Party Defendant.

Civil No. C80-8167

Judge: David Young

This matter came on for pre-trial conference on Monday, August 31, 1987, at 2:00 o'clock p.m. by order of the court. Personal appearances were entered by the plaintiff, Reed Maxfield; plaintiff's counsel, Charles C. Brown and Jeffrey B. Brown; defendants Rushtons' counsel, Henry S. Nygaard; and counsel for State of Utah, namely: Steven Schwendiman, Bernard Tanner and Leonard McGee. The plaintiff, Reed Maxfield, and his legal counsel argued that the issues of the Second Amended Complaint included those set forth in plaintiff's proposed Third Amended Complaint, a 1983 civil rights cause of action, and that Steven Schwendiman be designated as a John Doe defendant. Plaintiff's counsel moved that they be allowed to withdraw upon the grounds that plaintiff has not consummated a fee agreement with counsel; counsel for the defendants Rushton and the State of Utah argued that all relevant issues were set forth in plaintiff's Second Amended Complaint and the defendants' responsive pleadings including their Answers, Crossclaims, and Counterclaims.

The court, after reviewing the pleadings and exhibits on file, having heard arguments from the plaintiff personally, and counsel for all the parties, and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff's causes of action be dismissed for failure to timely prosecute.

2. Rights of redemption shall commence to run upon execution of this Judgment.

3. Defendants are awarded costs.

DATED this 30 day of September, 1987.

BY THE COURT:

/s/ Judge David Young
Judge David Young

APPROVED AS TO FORM:

BROWN, SMITH & HANNA

By: _____
Charles C. Brown
Counsel for Plaintiff

STATE OF UTAH

By: _____
Bernard Tanner
Assistant Attorney General
Counsel for State of Utah

HENRY S. NYGAARD, ESQ. (Bar No. 2435)
BEASLIN, NYGAARD, COKE & VINCENT
Attorneys for Owen A. Rushton and Carol Rushton
333 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 328-2506

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

REED MAXFIELD AND UTAH'S GREAT GAME PRESERVE, Plaintiffs, vs. OWEN A. RUSHTON, CAROL RUSHTON, et al, Defendants.	NOTICE OF ENTRY OF JUDGMENT
OWEN A. RUSHTON and CAROL RUSHTON, Third Party Plaintiffs, vs. STATE OF UTAH, by and through Utah State Department of Social Services, Third Party Defendant and Third Party Plaintiff, vs. REED MAXFIELD, Third Party Defendant.	Civil No. C80-8167 Judge: David Young

TO ALL PARTIES:

NOTICE IS HEREBY GIVEN that Judgment was entered in favor the defendants on the 30th day of September, 1987, by the Honorable David Young. A copy of the Judgment is attached.

DATED this 2 day of October, 1987.

BEASLIN, NYGAARD, COKE & VINCENT

By: _____
Henry S. Nygaard
Attorney for Defendants Owen A. Rushton and Carol Rushton

STATE OF UTAH)
) SS:
County of Salt Lake)

MARGARET A. NELSON, being duly sworn, says:

That she is employed in the offices of Beaslin, Nygaard, Coke & Vincent, attorneys for defendants Owen A. and Carol Rushton herein; that she served the attached NOTICE OF ENTRY OF JUDGMENT upon:

Bernard Tanner, Esq.
Asst. Attorney General
130 State Capitol Bldg.
Salt Lake City, UT 84114

Mr. Reed Maxfield
410 East 7620 South
Midvale, UT 84047

Charles C. Brown, Esq.
Jeffrey B. Brown, Esq.
Brown, Smith & Hanna
City Centre I, Suite 401
175 East 400 South
Salt Lake City, UT 84111

by placing a true and correct copy thereof in an envelope and depositing the same, sealed, with first-class postage prepaid thereon, in the United States mail at Salt Lake City, Utah, on the 2 day of October, 1987.

Margaret A. Nelson

Subscribed and sworn to before me this 2 day of October, 1987.

Notary Public
Residing at Salt Lake City, UT

My Commission Expires:
12-16-90